

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

Supplemental to
Civil Action No. 94-1564

Hon. Thomas Penfield Jackson

**MEMORANDUM OF THE UNITED STATES IN
OPPOSITION TO MICROSOFT'S MOTION FOR A DEFINITE
DESCRIPTION OF THE ALLEGED "OTHER" PRODUCT**

On December 11, 1997, this Court tentatively concluded that Microsoft's forced licensing of Internet Explorer to OEMs with Windows 95 violated Section IV(E)(i) of the Final Judgment, entered a preliminary injunction, and referred matters pertaining to construction and application of Section IV(E)(i) to a special master. Despite the reference, Microsoft now asserts that its due process rights will be jeopardized unless the Court orders "DOJ to specify precisely (i) what the 'other product' is that Microsoft allegedly 'tied' to Windows 95 in violation of Section IV(E)(i) of the Consent Decree and (ii) the basis for the DOJ's contention that such 'other product' i[s] not a feature or element of Windows 95 as an 'integrated product'" (Motion for a Definite Description of the Alleged "Other" Product ("Motion") at 8). Microsoft's Motion should be denied.

As an initial matter, as Microsoft knows, the issues Microsoft now wishes the Court to compel the United States to address are among those the Court has “entrusted” to the special master to address in the “first instance” (Tr. at 3 (Jan. 9, 1998)). Microsoft’s Motion thus invites the Court to intercede in Professor Lessig’s ongoing proceedings. Such intervention is unwarranted. Microsoft recently raised before Professor Lessig *precisely* the same request that it now makes to the Court in its Motion. Professor Lessig denied that request, explaining that, in his judgment, the question of “what is IE” need not be resolved immediately in view of the relationship between that issue and the “question whether ‘other product’ is to be understood against the background of antitrust” (Tr. at 76 (Dec. 30, 1997)), which he directed the United States to address in a brief to be filed on January 29, 1998.

Microsoft plainly cannot claim that it has been prejudiced, let alone denied due process, by Professor Lessig’s judgment that briefing on Section IV(E)(i) issues should progress in an expeditious yet orderly manner. Indeed, it is plain that Microsoft’s Motion amounts to an inappropriate use of the equivalent of a Rule 12(e) Motion For A More Definite Statement to circumvent Professor Lessig’s orderly process and to gather additional information Microsoft believes would be useful in “preparing” for further proceedings before him. Fed. R. Civ. P. 12(e) (Advisory Committee Notes).

Moreover, the issues Microsoft raises are of no immediate significance to this Court. As the Court recently explained, the only issue presently before it is whether Microsoft “is in compliance with the December 11[, 1997, preliminary] injunction” (Tr. at 2 (Jan. 9, 1998)). Whether Microsoft has violated that Order, which prohibits Microsoft from effectively conditioning an OEM license to Windows 95 on an OEM licensing and preinstalling “Microsoft Internet browser software,” turns on the meaning of the Order’s language. *See* Tr. at 13 (Jan. 13,

1998 am) (explaining to Microsoft's counsel that "we're here dealing solely with the language that I used in the preliminary injunction"). It does not require deciding the ultimate issue (which Professor Lessig is in the process of addressing) of whether Microsoft has conditioned a license to Windows 95 on an OEM licensing an "other" product in violation of Section IV(E)(i) of the consent decree.

In any event, the premise of Microsoft's Motion -- that the United States has "altered its position radically" with respect to the definition of the "other" product (Motion at 4) so as to deny Microsoft due process -- is baseless. In its Petition and supporting briefs, the United States gave Microsoft ample "notice" of the allegations against it. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The supposed "radical" alteration to which Microsoft points simply reflects the varying issues the United States has addressed in different briefs.

In its Petition and supporting briefs, the United States addressed two distinct issues: first, the attributes that make Internet Explorer an "other" product within the meaning of Section IV(E)(i); and second, the question of remedy. *Compare e.g.*, US Reply Br. at 3-15 *with* US Reply Br. at 15-17. That the United States used different formulations in addressing these issues is wholly unsurprising because, contrary to what Microsoft asserts, the factors that show the existence of an "other" product (including its availability apart from Windows 95), and thus a Section IV(E)(i) violation, do *not* determine the quite different question of the appropriate remedy for such a violation. For instance, Microsoft Word indisputably is an "other" product within the meaning of Section IV(E)(i). Nonetheless, as demonstrated at the recent evidentiary hearing, because Microsoft Word delivers certain shared program libraries that, when installed on a computer containing Windows 95, may upgrade and replace certain essential Windows 95 system files, removing *every* file Microsoft Word installs would disable Windows (Tr. at 15-20

(Jan. 13, 1997 pm)). As the United States has explained, the same is true with respect to Internet Explorer.¹

Microsoft's further assertion, that the United States' contempt papers point to mere "fragments" of Internet Explorer that "could never satisfy DOJ's own criteria for determining what constitutes an 'other product'" (Motion 5-6), ignores not only this distinction between violation and remedy, but also the fact that the meaning of the Court's Order cannot be determined simply by referring to the remedy the government proposed. Similarly, Microsoft's assertion that the United States' briefs in support of its motion for a judgment of contempt and to enforce the preliminary injunction "are all over the map" (Motion at 6), founders on Microsoft's refusal to distinguish between the meaning of the preliminary injunction and the steps that might bring Microsoft into compliance. The passages to which Microsoft points, rather than demonstrating "utter confusion" (Motion 5-6), simply articulate in slightly different ways the injunction's general prohibition, *see* US Contempt Motion at 3, 7; US Contempt Reply Br. at 3-4, the particular remedy the United States proposed, *see* US Contempt Motion at 4, and why that remedy, if implemented, will terminate the conditioning the injunction forbids, *see* US Contempt Reply Br. at 8.

In short, far from "hampering the Court's ability to adjudicate" the issues before it (Motion at 7), the United States has addressed the only issues presently before the Court: the

¹The United States further explained that appropriate relief might differ depending on whether Internet Explorer was distributed to OEMs on a separate disk (as was the case with Internet Explorer 4) or included with Windows 95 on the same master disk (as remains the case with Internet Explorer 3). *Compare* US Reply Br. at 15 (explaining that because Internet Explorer "4.0 is presently offered only as a separate, stand alone product" an order simply prohibiting Microsoft from forcing OEMs to license that product would suffice) *with id.* at 17 (explaining that Microsoft might need to include in a version of Windows 95 that does not include Internet Explorer 3 some version of the system files it includes with its retail release of Internet Explorer 3).

injunction's proscription and how Microsoft can be brought into compliance. To the contrary, by requesting further briefing in this Court on issues that Professor Lessig proposes to address in an orderly fashion, it is Microsoft that seeks to interfere with the process this Court established.

Dated: January 20, 1998

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 20, 1998, copies of the foregoing MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO MICROSOFT'S MOTION FOR A DEFINITE DESCRIPTION OF THE ALLEGED "OTHER" PRODUCT were served by facsimile transmission and Federal Express overnight delivery upon:

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